

Service Date: October 26, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF VERN REUM AND)	TRANSPORTATION DIVISION
SHANE E. REUM, dba TIRES-R-US,)	
Polson, Montana, Application for)	DOCKET NO. T-9590
Intrastate Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6326

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

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na, Montana 59601

FOR THE PROTESTANTS:

Paul Neal Cooley, Skelton and Cooley, Attorneys at Law, 101
E. Main, Missoula, Montana 59802, and Frank C. Crowley,
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59624, Representing the Protestants, Wee-Haul Garbage, Inc.,
Flathead Disposal, Inc., Marc Johnson, Marc Johnson and
Walter Trump, dba Mission Valley Disposal, Charles Kelly,
dba Frank's Service and dba Kelly's Haul Away, Evergreen
Disposal, Inc., and Browning-Ferris Industries of Montana,
Inc.

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, and Dave Burchett,
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BEFORE:

BOB ROWE, Vice-Chairman

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

INTRODUCTION

1. The administrative proceeding preceding this Order spans a period of over four years. Events preliminary to this case, commenced in mid-1990 when the Public Service Commission (PSC) was asked to investigate certain transportation activities of Vern Reum, dba Tires-R-Us (Reum), Polson, Montana. Investigation established that Reum was transporting used tires and wheels from area tire businesses to his Polson recycling, salvage, and disposal site, but had no motor carrier authority to do so. First analysis concluded that Reum was conducting transportation that appeared to be within the definition of "motor carrier," see, Sec. 69-12-101(6), MCA, and for which authority would be required, see, Sec. 69-12-401, MCA.

2. No PSC enforcement action was taken, as on August 8, 1990 Reum filed an Application for Intrastate Certificate of Public Convenience and Necessity, requesting Class D authority (waste), used tires and wheels, from Missoula, Whitefish, Columbia Falls, and Kalispell to Polson (routes being in Flathead, Lake, and Missoula Counties). The application was assigned PSC Docket No. T-9590 (the present docket). Public notice of the application was issued and protests were received from motor

carriers having authority to provide like services in the areas proposed.

3. On review of Reum's 1990 application, a question arose, given the nature of Reum's overall business operations, whether the transportation aspect might properly be excluded from the definition of "motor carrier" as being incidental to a principal nontransportation business. Following a suggestion by PSC staff, Reum petitioned the PSC for a declaratory ruling on that question. The petition was assigned PSC Docket No. T-9688.

4. Upon filing of the petition, further PSC action on Reum's 1990 application was stayed. Reum's petition was noticed to the public and contested (protested), primarily by those carriers who had filed protests to Reum's application.

5. The petition was processed and, on January 7, 1992, the PSC issued a ruling (In the Matter of Reum, Declaratory Ruling, PSC Docket No. T-9688, affirmed by Notice of Commission Action on reconsideration, March 3, 1992), concluding that Reum's transportation activities were not regulated motor carriage, being merely incidental to Reum's principal business of recycling, salvage, and disposal of used tires and wheels (for convenience, reference to "tires" will include "wheels" in the remainder of this Order, unless the context dictates otherwise).

6. Several of the protestants then sought judicial review of the PSC's ruling. On judicial review the PSC was reversed and ordered to proceed with Reum's pending (stayed) 1990 application for authority. See, Solid Waste Contractors, et al. v PSC, Order on Petition for Judicial Review, Cause No. BDV 92-448, Montana First Judicial District (September 21, 1993). The court decision was not appealed.

7. On December 10, 1993 Reum (then Vern and Shane E. Reum, dba Tires-R-Us) amended the 1990 application for motor carrier authority. The matter remained docketed as T-9590. The authority requested by Reum remained the same -- Class D (waste, but then including recyclables as the Class D definition had been amended, see, Ch. 341, L. 1991), used tires, from points in Flathead, Lake, and Missoula Counties, to points in Lake County.

8. On December 16, 1993 the PSC indefinitely deferred ruling on Reum's accompanying application for temporary operating authority and suspended enforcement on Reum's transportation of used tires until the PSC's ruling on Reum's amended application (this Order) becomes final.

9. Reum's amended application was noticed to the public. Protests were received anew from most protestants to the 1990 application. The protestants as of the time of hearing include:

Wee Haul Garbage, Inc. (Wee Haul); Evergreen Disposal, Inc. (Evergreen); Charles Kelly, dba Kelly's Haul Away (Kelly's); Charles Kelly, dba Frank's Service (Frank's); Browning-Ferris Industries of Montana, Inc. (BFI); Marc Johnson (Johnson); Marc Johnson leased to Flathead Disposal, Inc. (Johnson or Flathead); Marc Johnson and Walter Trump, dba Mission Valley Disposal (Mission); and Weston L. and Sandra M. MacDonald, dba MacDonald Disposal (MacDonald).

10. MacDonald and any protestant (if any) not listed above did not appear at hearing are hereby dismissed as parties to this docket (see, ARM 38.2.3904). Additionally, procedural or compliance deficiencies affect the status of several of the identified protestants. These will be discussed later.

11. Public hearing on Reum's application was held April 7 through 8, 1994, in Missoula. Evidence was taken, briefs have now been submitted, and the PSC has considered the matter and concludes that the requested authority should be GRANTED, for the reasons expressed in the following findings of fact and conclusions of law.

FINDINGS OF FACT

Preliminaries

12. All introductory statements which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

Orientation

13. In this matter the PSC is considering proposed transportation services in three contiguous northwestern Montana counties -- Flathead, Lake, and Missoula. The proposed service pertains to transportation of used tires. However, playing a role in the PSC's analysis of the factors to be considered in granting or denying a request for motor carrier authority (discussed later) are a number of pertinent facts that can best be explained by narrative (as supported by the record). These are the environment in which the proposed transportation services (used tires) have been and will be performed by Reum and the existing carriers.

14. For the relevant period (1989 to present), Flathead County has had a landfill that does not accept used tires. However, Dennis Rasmussen (Rasmussen) owns and operates a certified tire landfill located in the county, near Kalispell. Rasmussen does not transport used tires and is not a motor

carrier. The testifying shippers in Flathead County include Northwestern Tire, Tire Rama, and Tire Rama West. Wee Haul has existing motor carrier authority to transport used tires (garbage) in and from Columbia Falls. Kelly's has existing motor carrier authority to transport used tires (garbage) in and from Kalispell. Wee Haul and Kelly's have been providing service to customers in their respective areas of authority. Reum has been providing service to customers in each of these areas and in Whitefish. Reum's proposed service in Whitefish was not protested.

15. Lake County has a landfill that did accept used tires in 1989. Presently it does not. However, Reum owns and operates his certified tire landfill in the county, near Polson. Johnson has motor carrier authority to transport used tires (garbage) in parts of Lake County. Whether Johnson has been providing such service remains unknown (Johnson did not testify, as is explained later). Reum has been providing service to customers in the area, primarily through an agreement with the local landfill (through the county).

16. Missoula County has a landfill, owned and operated by BFI. It always has and still does accept used tires. The testifying shippers in Missoula County are Les Schwab Tire Center

and three Tire Rama stores. BFI has motor carrier authority to transport used tires in Missoula and does provide that service to customers in the area. Reum has also been providing service to Missoula.

17. In addition to service to the tire businesses and any other generators of used tires, by either the existing motor carriers or by Reum, "service" in each of the communities is through self-haul (generally not regulated) to the local landfills or tire pits or through interstate carriers (not regulated at the state level) to points out of state.

Public Testimony

18. The first public witness was Jerry Noble (Noble), Chairman of the Environmental Quality Council of Montana, a tire dealer, and a member of a tire dealers' association presently working on legislation to deal with scrap tires. Noble primarily presented information on proposed legislation (for the next session), explaining that it would impose a tax of some kind on tire sales and would fund a board with the objective of eliminating landfilling of tires through recycling or reuse of all scrap tires. He testified that in the areas of his tire businesses (Great Falls, Bozeman, Havre, Cutbank) scrap tires are now

landfilled. He testified that at present a subsidy is generally required to make recycling of tires workable.

19. The next public witness, Rasmussen, testified that he owns a tire pit (Rasmussen site) in Kalispell, which is open two days a month. He generally expressed a concern about Reum's application because, as he (Rasmussen) has no motor carrier authority, if authority were granted to Reum, his tire site would probably be put out of business and the public would suffer through increased prices absent competition. Rasmussen also believes that there is sufficient existing authority in the area and that used tires are junk, unsafe for reuse. He also commented that the concept of mining buried tires for recycling or fuel (Reum's expectation) has some problems. Rasmussen explained that at one time he had attempted to grind tires and sell the rubber, but found it not profitable due to low fuel prices for competing fuels.

Reum's Case

20. Reum's first witness was Vern Reum (also referenced as Reum). He generally described the past and present business conditions, operations, and capabilities of Tires-R-Us. Financial statements, equipment lists, and other supporting documenta-

tion were submitted. Reum described the circumstances during the past years (primarily in 1989 and 1990) which led him to start his tire salvage and recycling business. He testified that he is willing and able to provide the services that he proposes.

21. Reum explained that Tires-R-Us is a tire recycling business located on about 11½ acres near Polson, a part of the property having been a gravel pit. He described the business as a partnership between himself and his son, Shane.

22. Reum testified that the idea for the Tires-R-Us business came about in 1988 and 1989, when he was employed to operate heavy equipment at Lake County's landfill, and through that job recognized a need for tire disposal and recycling. In his observation, resulting from personal investigation of the area at the time: certain area (Flathead County) landfills were not accepting tires (according to Reum, the Rasmussen facility was closed from 1986 to 1992, but has since reopened, this later was refuted); there were large stockpiles of used tires at several area (Flathead and Missoula County) tire businesses; and there were incidents of illegal tire dumping on public land in the area (Flathead County) and at the Lake County landfill.

23. Reum testified that in 1989 he discussed transportation of used tires with certain businesses in Flathead and Missoula

Counties, which were eager to have someone take their stockpiles.

He testified that he then applied for a landfill license (Class III, used tires only, referred to as a "monofill") in mid-1989 and received it in early 1990. He testified that he began transportation of used tires in late 1989 and in about four months he had reduced the stockpiles in the areas. Reum testified that he served numerous businesses during that time. Reum agreed that he had no PSC authority to transport the used tires, but also explained that he did not believe he needed authority. Reum also agreed that he has not yet landfilled the tires collected from area stockpiles, part of the reason being that he wants them as proof that there were such stockpiles. Reum also testified that during this period of time BFI had told him that BFI was not interested in transporting tires.

24. Reum testified that his business was and remains the collecting, transporting, and sorting of used tires for salvage, resale, recycling, or landfilling. Reum also explained that the salvageable tires collected are maintained for sale or retreading and the others are processed for recycling or stockpiled or landfilled for eventual recycling. (Reum consistently maintained that any landfilling of tires by him is storage for eventual retrieval.) Reum indicated that approximately 75 percent of the

tires presently collected are "stockpiled" through landfilling. Reum maintained that landfilled tires are for eventual recycling, although no such retrieval has yet occurred and Reum agrees that he has not recycled a landfilled tire to date.

25. Reum testified that in 1991 he was still transporting from Flathead and Missoula Counties. He testified that in 1993 he obtained a contract from Lake County to transport used tires from Lake County tire businesses. He testified that after the PSC ruled that his transportation was excluded from the definition of motor carrier (1992) he then discovered existing carriers' rolloff containers at tire businesses in the area (Flathead County). He testified that he also then lost several customers in Flathead County and one customer in Missoula County. He stated that for this reason he has delayed expanding his business, including the purchasing of rolloff containers.

26. Reum testified that he maintains liability insurance on his equipment. Eight of his eleven acres are dedicated as a pit (landfill). He has a large shop, some of which is for storage of used tires and wheels. He has various tire machines and tire processing machines (slicers and dusters), and three trucks and two trailers used for hauling. He testified that he has sufficient equipment to perform the services proposed. He testified

that he is willing to meet the needs of his customers and can expand to meet future need if required.

27. Reum testified that he has researched and continues to stay current on the issues involved in reuse and recycling of used tires. He testified that some planning is being made with at least one local business for making products out of used tires. Apparently, this has not gone beyond the planning stage.

28. Reum indicates that part of the tires collected by him are landfilled and a part are stored above ground. Some are presently stored for use as a fence or wall around his property.

As noted, the ones retrieved from area business stockpiles in 1989 remain above ground, but according to Reum are being sliced daily for landfilling. Apparently 5,000 to 7,000 (of the roughly 80,000 tires collected from area stockpiles in 1989 and 1990) have been sliced in the last six to eight months.

29. Reum believes that there is a need for the services that he proposes. He testified that to the extent that any of his transportation operations might have been illegal they were initially not done with any intentional violation in mind. For most of the period from 1989 to present, they were done with knowledge of the PSC, either under ruling or stay of enforcement.

30. Reum is steadfast in his opinion that there will be a use for the used tires he is stockpiling and that retrieving landfilled (if monofilled) tires can easily be done. However, he admits that transportation is a significant cost in recycling; that there are currently more scrap tires than demand for scrap tires; and that he must presently transport tires for landfilling to make his business economical through volume.

31. Reum's next witness was Dwayne Dunkin (Dunkin), the store manager of the Kalispell Tire Rama. Dunkin testified that his business has a need for transportation of used tires, that he presently uses Reum's service, and that he would continue to use Reum's service if authority were granted. He testified that he produces about 200 to 300 used tires a month, on average. He testified that he had previously worked for another tire business in Kalispell and that he is familiar with events in 1989. In 1989 his tire business had to transport its own used tires to Rasmussen's. He did not believe there were any tire haulers in the area at that time and he agreed that there were stockpiles of used tires in Kalispell.

32. Dunkin testified that Evergreen (protestant) had contacted him within the several days before the hearing, offering to provide service, but had not done so before. Apparently the

price proposed was comparable to Reum's service, insofar as he understood Evergreen's pricing mechanism. He stated that he has a need for transportation of used tires. He stated that he prefers recycling of used tires. He would like to see Rasmussen's business stay open. He does not really care who transports the used tires so long as the price remains the same. He had not had problems with Evergreen for other garbage service. He indicated that about 25 percent of tires given to Reum are salvageable.

33. Tom Taylor (Taylor), store manager of Tire Rama West, in Kalispell, was Reum's next witness. His testimony paralleled Dunkin's, except that he found Evergreen's price sheet complicated and determined that the cost would be more. He stated that his business produces 500 to 600 used tires per month on the average. His only concern is that tires are disposed of legally. He had believed that Evergreen did not transport tires, as a tire that had been in his business's dumpster was rejected by Evergreen at one time and, also, the local landfill did not take tires.

34. Reum's next witness was Mike Oehlerich (Oehlerich), owner of Central Tire, in Whitefish. As events developed at hearing the protestants advised that the Whitefish area was unprotested. The witness then merely provided general testimony

that he had used Reum and found services to be good and that he had observed a large stockpile of used tires at one location in Kalispell several years ago.

35. Jim Roth (Roth), owner of two tire stores, Northwestern Tire in Kalispell and Northwestern Tire in Columbia Falls, testified as Reum's next witness. He testified that he has a need to transport used tires. He stated that his two businesses together produce about 3,000 used tires per month, on average. Roth testified that his transportation of used tires has changed during the years. Apparently from about 1979 to 1983 the tires were disposed of by self-haul to the local landfill. Then for a couple of years it was self-haul to Rasmussen's site, until Rasmussen increased rates in 1984 or 1985 to the point where Roth believed it was unacceptable and began using interstate transportation to Idaho.

36. Roth testified that in 1989 Reum began transporting for him and he was satisfied with the job done by Reum. He testified that during this time no authorized carrier had contacted him, until about one year prior to hearing, when Evergreen solicited business at his Kalispell location and Wee-Haul solicited business at his Columbia Falls business. However, he admitted that he had not contacted the existing carriers. According to Roth,

Evergreen's and Wee-Haul's prices are lower than Reum's and Evergreen and Wee-Haul are doing the transportation now. He commented that Reum still is used when there is a large collection of tires, but the existing carriers have not been contacted to see if they would do those moves.

37. Brad Griffin (Griffin), executive vice-president of the Montana Tire Dealers Association, then testified as a Reum witness. Essentially, Griffin's testimony amounted to the same discussion of proposed legislation previously discussed by Noble (public witness, testimony summarized above).

38. Reum's next witness was Rick Thompson (Thompson), environmental specialist in the solid waste program of the state Department of Health and Environmental Sciences, whose responsibilities include review and licensing of solid waste facilities.

Thompson generally discussed disposal and recycling of used tires and problems with landfilling of tires. He noted that Reum's landfill is not licensed as a resource recovery landfill and Reum could not take tires out of the landfill without being so licensed. He commented, from photo exhibits, that tires stored by Reum above ground might or might not be out of compliance with state Class III landfill requirements.

39. Andy Sherry (Sherry), manager of the West Broadway location of Les Schwab Tire Centers in Missoula was the next witness for Reum. He testified that his business requires the transportation of used tires. He stated that his business produces between 500 and 1,000 used tires per month, on average.

He has used Reum for transporting about 400 tires per week and is satisfied with Reum's services. Prior to Reum's service Sherry's scrap tires were chopped by his business and retrieved by BFI for disposal. Sherry indicated that his business is interested in permanent service by Reum, but is also considering a company promoted, company-wide, tire recovery program involving interstate movement. He testified that BFI currently provides service at one of his locations in Missoula and has contacted him recently for additional service.

40. Sherry testified that he favors recycling of tires over landfilling in common with other waste. He testified that he would use Reum, unless a less costly alternative for recycling developed. He testified that the cost for BFI service, compared to Reum's, was about equal for passenger tires and double for truck tires. He testified that he had received a copy of a BFI memorandum to BFI employees suggesting a boycott of those area tire businesses, including his, that were supporting Reum's

application. Sherry testified that his company, on the regional level, does extract whole tires from pits to use and sell for fuel. Sherry agreed the distance for transportation was minimal in that situation.

41. Skip Harden (Harden) was Reum's next witness. He is the manager of a Tire Rama in Missoula. He testified that he has a need for transportation of used tires, about 400 to 500 per month. In 1989 he had accumulated a stockpile of used tires, as a Spokane-based interstate transporter was not dependable or had quit. He has used Reum and finds service good and would continue to use Reum if Reum obtains authority. He was never contacted by BFI for service. He has not contacted BFI for service. His main concern is legal disposal of tires, but he stated that he might favor recycling.

42. Reum's next witnesses were Austin White (White) and William Bangs (Bangs) managers of other Tire Rama stores in Missoula. White testified that his business generated about 500 to 600 used tires per month. White's and Bangs' testimony was essentially the same as Harden's (summarized above) for all other material purposes.

43. The protestants' first witness was Johnson, on behalf of his authority leased to Flathead Disposal. Reum objected to Johnson's testimony because Johnson failed to respond to discovery. Johnson's testimony was therefore limited by the PSC to matters that could be found in other related discovery. Apparently Johnson believed that there was no such testimony, as, following a brief offer of proof, he did not testify further.

44. The protestants' next witness was Henry Hoyer (Hoyer), on behalf of Wee Haul. Wee Haul has motor carrier authority to transport waste. Hoyer testified that he transports used tires and disposes of them at Rasmussen's, as the local landfill does not accept tires. He testified that the one tire dealer he was serving at the time Rasmussen raised rates informed him that unless he came up with another location, it no longer needed him to transport. Hoyer believes this problem no longer exists. He does not think that landfill recovery of tires is feasible at this time. He thinks that tires are now only waste. He testified that Reum's operations have had an adverse effect on his business. Evidence indicates that Hoyer's rates are comparable or lower than Reum's. He testified that Flathead County needs to have Rasmussen's site left open. He testified that he advertises in his area (Columbia Falls) and is capable of providing all ser-

vice required in that area. He was not contacted by the local tire business to transport tires in any other way.

45. Terry Kelly (Kelly), on behalf of Kelly's, Kalispell, next testified as a protestant. He testified that his business is severely impacted by Reum's operations. He testified that in his area of service tire dealers have been transporting their own used tires. The record reflects that he charges substantially the same rate as Reum. He stated that he has never denied used tire transportation service to any customer. He views scrap tires as waste, not assets.

46. Kelly is also associated with Frank's and Evergreen, both being authorized carriers. Reum moved to dismiss Frank's and Evergreen for failure to respond to discovery. The motion was denied. However, Kelly did not provide separate testimony on behalf of these carriers, in any event.

47. The protestants' next witness was Cliff Boyd (Boyd), technical support and sales representative for BFI. He testified that BFI has never refused to take tires at its Missoula landfill nor has BFI required chopping of tires before disposal. He testified that BFI's price for disposal of a tire is 90 cents whole, 45 cents split. He testified that recycling is an inter-

est of BFI, but tire recycling is simply not economically sound or feasible at this time.

48. Max Bauer, Jr. (Bauer), divisional vice-president of BFI, then testified as a protestant. Bauer testified that BFI is interested in recycling, but is not going to invest in a program to use scrap tires until it is sure that a supply and market exist. He believes that subsidized recycling programs are prone to failure and that a "self-generated" recycling market is necessary for recycling to work. He stated that a recycler must be able to concentrate the supply and that if others obtained part of that supply it erodes the stability of supply. According to Bauer, because of transportation costs recycling of tires is workable only with backhauling (paying return loads). He testified that BFI believes that mining of landfilled tires is not economically feasible today, as it is one more expense added to what is already a marginally profitable enterprise. He commented that tire derived fuel must compete with cheap coal and natural gas. BFI has doubts whether there are enough local tires to supply a local market for tire derived fuel, even if one were to develop.

49. Bauer testified that he had talked to Reum in 1989 and told Reum that BFI was not interested in hauling tires "into the

Flathead area." (Reum had testified that Bauer had told him that BFI was not interested in transporting tires "at all.") Bauer testified that BFI is definitely interested in hauling tires. Bauer testified that he does not believe Reum's site is in compliance with law and BFI would not haul to Reum's location at this time. Bauer believes that used tires without a market are a liability not an asset. Bauer testified that he did write a memo to BFI employees concerning doing business with those supporting Reum, because he simply wanted the recipients to think about supporting the people who support BFI. He also testified that tires are not a problem at a well-managed landfill disposal site. He testified that in his opinion Reum's operations adversely affect BFI's and benefits only Reum and not the public. He testified that BFI advertises and does trade shows. He testified that BFI buries tires in common with other wastes at its landfill at this time.

CONCLUSIONS OF LAW

Preliminaries

50. All findings of fact which can properly be considered conclusions of law and which should be considered as such to

preserve the integrity of this order are incorporated herein as conclusions of law.

51. The PSC has jurisdiction over applications for motor carrier authority pursuant to Title 69, Chapter 12, MCA. The application of Reum is proper in form and was properly noticed, protested, and heard in accordance with Title 69, Chapter 12, MCA, and Title 2, Chapter 4, MCA (Montana Administrative Procedures Act).

Procedural Matters

52. There are several procedural matters which require some discussion prior to addressing the substantive merits of Reum's application. To the extent that these are based on motions, objections, or arguments which have already been ruled on, at or prior to hearing, but raised again in briefing of the parties (or on the PSC's own motion), they should be considered as being discussed on reconsideration.

53. The protestants questioned whether Reum's 1993 application should be treated as a "new" or an "amended" application for purposes of establishing the period of time for which proof pertaining to the elements of public convenience and necessity would be relevant. The PSC has since Reum's filing viewed the

1993 application as amending his 1990 application and sees no reasonable basis to view it otherwise. Reum's December 10, 1993 cover letter accompanying the amended application clearly notes Reum's intention that the application simply amends the previous one. No objection, if any valid one even existed, was raised at that time.

54. Reum comments on the PSC's denial of his motion to dismiss parties not responding to discovery. According to Reum, only BFI, Kelly's Haul Away, and Wee-Haul responded to prehearing discovery. Reconsideration of this point would now be inconsequential. As mentioned above, for all material purposes BFI, Kelly's Haul Away, and Wee Haul were the only protestants providing any testimony that can be viewed as amounting to substantial evidence in this case. Therefore, the status of the others, dismissed or not, simply does not remain a material concern.

55. Reum also comments on an inconsistency in the PSC's treatment of witnesses, who for one reason or another were not allowed to testify as part of a party's case in chief. Specifically, Reum comments that witness Rasmussen was allowed to testify as a public witness while witness Oehlerich was not. First, the PSC finds that there is a significant distinction between these witnesses (Rasmussen is neither a shipper nor a

carrier; Oehlerich is a shipper). Next, Oehlerich was not allowed to testify in Reum's case in chief not to impose a sanction, but simply to expedite the hearing. Absent a protest to the Whitefish area, Reum having a shipper witness present to testify in support of the proposed service in the Whitefish area, it was recognized that authority to serve that community would be obtained.

56. On a technical point, Reum argues that the protestants submitted no evidence of their existing authorities (or service areas). Such is the case. However, although it may be advisable to present some evidence of authorities, the PSC will not view as fatal an existing carrier's failure to do so under the circumstances. The protestants are well known by both the PSC and Reum to have authority. The matter was not subject to any legitimate contest. Requiring proof of an uncontested fact under these circumstances would be pointless. The PSC takes judicial notice of the protestants' authorities on file with the PSC.

57. Reum also argues that protestants did not submit evidence of equipment available to provide service. Although protestant motor carriers might customarily provide equipment lists, fitness of the protestants was not a contested issue. Furthermore, an application for authority is generally not a

place where fitness of the protestants is reviewed. The complaint process is available for that. Absent a directly contested issue or proof to the contrary in a proper setting (a complaint proceeding), the existing carrier protestants, by virtue of holding authority, are presumed fit.

Elements of Public Convenience and Necessity

Introduction

58. The merits of Reum's case turn on the elements of public convenience and necessity. The PSC will generally grant motor carrier authority when the "public convenience and necessity" requires authorization of the service proposed. In this regard, Section 69-12-323(2), MCA, provides:

(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms

of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

59. Additionally, Section 69-12-415, MCA (Ch. 156, L. 1993), provides that an authority may not be issued (or remain in force) unless the holder is fit, willing, and able to perform the service authorized and conforms to applicable legal requirements.

60. When a Class D authority is being considered by the PSC, Section 69-12-323(2), MCA, also provides:

(b) For the purpose of Class D certificates, a determination of public convenience and necessity may include a consideration of competition.

61. There are specific elements involved in reaching a determination on whether public convenience and necessity requires authority. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority in Montana when each of the required elements demonstrate that authority should be granted. Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987a, p. 8 (July 17, 1990), includes a narrative statement of the required elements (the elements have been described in numerous other PSC opinions, sometimes in slightly different ways, but all the same in substance):

Applying this language [sec. 69-12-323(2), MCA] to the facts presented by any application for authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the Applicant has demonstrated that there is a public need for the proposed services. If the Applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the Applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an Applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the Applicant fit to provide the proposed service.

62. The "fit, willing, and able" language of Section 69-12-415, MCA, was enacted subsequent to the opinion in Jones Brothers. However, as the quote from Jones Brothers indicates, the PSC has historically treated fitness as an element. Additionally, as indicated above, in Class D matters there is the element of competition (Jones Brothers was not Class D). There is not yet a readily available concise summary explaining the competi-

tion element, so further discussion of competition will accompany the specific analyses below.

Element 1 -- Public Need

63. The first element to consider in determining whether public convenience and necessity requires a grant is public need.

(It should be noted that this element and the second element, "existing carrier ability to fill that need," can be, and have been, discussed as one element. The PSC has separated the elements for burden of proof purposes and considers them separately as a matter of convenience and clarity.) In regard to public need, Reum presented shippers from Flathead County (Kalispell, Columbia Falls, Whitefish) and Missoula County (Missoula). All expressed a need (past, present, and future) for the service of transportation of used tires. There is no evidence, let alone substantial evidence, in the record that tends to contradict this. The PSC therefore concludes that Reum has established the first element. In the area of proposed service, there was a public need for transportation of used tires in 1989, the need continues to the present date, and the need is likely to continue into the future in Flathead and Missoula Counties.

64. In regard to Whitefish, it became apparent at hearing that Reum's proposed service in Whitefish was not protested. At hearing Reum was prepared, through witness Oehlerich, to establish a need. Insofar as the need element is concerned, authority will be granted for service to Whitefish.

65. In regard to Lake County, although Reum testified to a need, no shipper witness testified. The PSC will generally not find need on the basis of the applicant's testimony alone. When a motor carrier case goes to hearing, there is generally no exception to the requirement that a shipper witness be present to establish need and stand cross-examination thereon. However, in this case, the sole protestant within Lake County, Johnson, also provided no evidence at hearing, creating a situation similar to an unprotested application. On this dilemma, opposing motions to dismiss were denied by the PSC, with the option for the parties to brief the matter.

66. In briefing, Reum argues that Section 69-12-324(1), MCA, providing that presentation of a written contract with the state government is sufficient proof of public convenience and necessity, should be extended to contracts with county governments. (Reum had testified concerning a contract with Lake County and submitted the actual contract as an appendix to

briefs.) The PSC disagrees with Reum's argument. Section 69-12-324(1), MCA, applies only to contracts with the state government; contracts with local governments do not fall within the scope of the statute.

67. In regard to the Lake County dilemma, the protestants argue that it is the PSC's policy that shipper witnesses must testify on unprotested areas when the matter goes to hearing. They also point out that this policy has consistently been applied by the PSC and has been affirmed on judicial review. The protestants reference Matter of Montana Recycling, Inc., Docket No. T-9925, Order No. 6171 (March 12, 1993), and (same title) Fourth Judicial District, Cause No. 77692, Opinion and Order (December 13, 1993). The PSC agrees that such has been a long standing PSC general policy; however the district court did not rule on the issue in affirming the PSC.

68. An applicant's failure to present a shipper witness for an area of proposed service, protested or unprotested, can be fatal to a grant of authority for that area. Consistent with this Reum's failure to present a shipper witness for Lake County could be fatal to Reum's case for service in Lake County. As a general rule, when a motor carrier case goes to hearing, shipper witnesses are required for support of the services in the entire

area proposed. However, "entire area proposed," in the context of "support for services in the entire area proposed," is not absolute, has proved impractical to define with certainty, and therefore must depend on the particular circumstances of the case. For example, in an application for statewide authority, shipper support from six out ten counties in each of five regions might be sufficient under some circumstances.

69. There are several circumstances that dictate that an exception to the general rule is proper in this case. First, Reum testified that at some time prior to hearing Johnson had stated to him that he would not be attending the hearing. At hearing Johnson stated that he did not "recall" or "remember" that statement, but did not testify that he did not make the statement. When a matter as significant as protesting an application for competing authority is involved, it seems reasonable that an existing carrier should clearly remember whether such statement was or was not made. Johnson's statement is simply too vague to be credible under the circumstances. The PSC concludes that Johnson had, at some time prior to hearing, indicated to Reum that he would not be attending the hearing.

70. Second, there is an immense distinction between the situation that the PSC faced in Montana Recycling, a statewide

authority supported by one shipper witness testifying to need in one county (the 50 plus others having no support), and the situation faced in the instant matter, a three county area with shippers testifying as to need in two of those. The PSC's rationale underlying the concern that there must be shippers supporting the entire area of proposed service does not come into play, as the threat of significant error on the actual public convenience and necessity is minimal if not non-existent.

71. The PSC concludes, under these circumstances, that Reum's failure to present supporting shippers for Lake County is not fatal to his application to serve within Lake County. The PSC will treat Reum's application for service in Lake County as unprotested and will consider Reum's reference to the contract with Lake County as sufficient proof of need at hearing.

72. Also relating to need, the protestants indicated at hearing through offers of stipulation that the protests were actually directed only at Reum's transportation of tires that are landfilled or that are to be landfilled (whether landfilled for storage or for disposal). With minor qualifications, they made it clear that they were not protesting Reum's transportation of tires for immediate recycling (or salvage) or Reum's transportation of tires, for any purpose, when no fee is charged. The

protestants' suggested a stipulation to a Class C authority. The PSC would likely grant the applied-for authority to the extent it is not protested, but concludes that with the balance of this Order granting the full authority request, further analysis on the point is not necessary. (The protestants' suggested authority would possibly create serious enforcement problems.)

73 Concerning the protestants' limitation to the extent of their protests, the PSC disagrees with Reum's conclusion that the protestants are concerned only about the end use of the tires. It is clear that the protestants are concerned about transportation of tires when the end use is essentially disposal.

74 As a final point pertaining to need, Reum's case included much on what might be described as a preference for recycling. The PSC cannot conclude from the record that there is yet any conclusion on the economic feasibility of various strategies to recycle used tires. For motor carrier purposes, the PSC is primarily concerned with a need for the transportation of used tires, regardless of the intended end use. However, a shipper's preference for recycling, as opposed to a shipper's preference for a particular carrier, cannot be ignored. No existing authorized carrier recycles used tires or presently intends to recycle tires. Most existing carriers testified that recycling is not

economically feasible at this time. Reum, on the other hand, is predominantly interested in recycling (albeit, whether that goal will be fully achieved remains a question).

75 The PSC concludes that a shipper's preference for recycling (not a preference for a particular carrier) is recognizable as a public need for purposes of considering a request for Class D motor carrier authority. This will be further discussed in the competition element.

Element 2 -- Ability of Existing Carriers to Meet the Need

76 The second element in public convenience and necessity is ability of existing carriers to meet the demonstrated public need. One of the key factors is that Reum went into business to fill a need when the existing carriers were not filling it. Reum met a need that others would not. Existing carriers were not pursuing a resolution to the need existing at that time.

77 In Missoula County and Flathead County, the existing carriers have established that they can now meet most needs (they are not meeting the preference for recycling). There is no substantial evidence in the record that would contradict this. However, meeting the need today and meeting the need at the time that Reum applied for authority are distinct points. There is no

evidence that the existing carriers were willing to meet the need at that time.

78 Reum also argues that the protestants ignored the needs of shippers and have established no reasonable presence. Reum argues that the protestants merely assumed that the shippers had no unmet needs. He argues that shippers were justified in believing they were on their own for the transportation of used tires. The PSC agrees, but confines that agreement to transportation of used tires. Normally solicitation by a carrier is not mandatory if the carrier has a reasonable presence in the service area. Normally reasonable presence in the area is met if the carrier advertises in the local Yellow Pages or equivalent. The protestants do this, but do not specifically mention used tires.

More importantly, in an area where the signal has been sent that a commodity is not transported and circumstances overwhelmingly indicate that a commodity is not transported, solicitation could become a factor. The PSC concludes that such a situation existed in this case. In the Class D setting, the PSC has stated a belief that there is an obligation on the part of existing carriers to market its services aggressively and to maintain a reasonable degree of visibility. Matter of Averill, Docket No. T-8643, Order No. 5651, para. 34 (December 18, 1985). The

existing carriers did not do this in regard to the transportation of used tires.

79 Reum argues that his proposed service is better tailored to meet the needs of the shippers. He argues that special and distinct needs exist and shippers are entitled to have these met. As special and distinct needs Reum references cost-effective disposal; preference for recycling; compliance with statutory requirements; aesthetics; and storage space problems; seasonal variations in demand; seasonal difficulties in self haul; and dealers' preferences not to load, haul, or sort. The PSC does not discount the special needs of shippers. An application might be granted on the basis of an applicant's ability to meet special needs when existing carriers cannot or will not do so. However, this is all no more than the second element (ability of other carriers to meet the need) restated.

80 Economic coercion is a point raised by Reum in arguments. There is some indication in the record that shippers sell tires and service to existing carriers and there is some sense that the shippers want to preserve this tire business. BFI distributed a memo suggesting that its employees not do business with tire businesses supporting Reum. Carriers have a right to support whatever businesses they wish. They are likely to do

business with those who do business with them, so long as it is reasonably cost effective. The PSC does not regulate this nor would it want to. In regard to BFI's memorandum, although the PSC is reluctant to approve of an authorized carrier boldly communicating economic threats, and determines that it is not appropriate, it concludes that in the absence of rules governing that specific activity, an actionable legal violation has not occurred. However, BFI's memorandum does demonstrate that without a grant of authority Reum might be dependent for transportation of tires (and therefore survival of his business) on a carrier possibly hostile to its interests.

Element 3 -- Harm to Existing Carriers

81 The third element is harm to existing carriers. The PSC concludes that this element needs little discussion for at least two reasons. One, although all of the existing carriers testified that Reum's operations have an adverse impact on them, the extent of the established adverse impact is minimal. Two, harm can exist so long as it is not contrary to the public interest and, in this case, the PSC concludes that the public interest is better served by competition (a permissible consideration in this Class D application), as its benefits outweigh the

minimal harm that may exist in this instance (the competition element and its affect on the harm element is discussed later, in more detail).

Element 4 -- Fitness

82 The fourth element is fitness. An applicant for motor carrier authority must establish that it is fit, willing, and able to provide the services proposed. See, Section 69-12-415, MCA. Reum has established this. There is no substantial evidence to the contrary. The only legal argument to the contrary pertains to Reum's "illegal" transportation movements in 1989 and 1990. Protestant motions, including a prehearing motion in limine, objections, and arguments pertain to this.

83 The protestants' concerns are not about transportation after Reum applied for authority, but transportation when Reum commenced operations. Since Reum's application the PSC deferred enforcement. There is some information in the record demonstrating that at least one protestant had suggested to Reum that his operations required authority; however, Reum was under no obligation to agree or abide by that suggestion. The administrative record shows that Reum did not exercise any bad faith disregard of the law. Reum's voluntary application for authority at the

time of investigation demonstrates this. The PSC concludes that Reum's transportation operations were believed in good faith by Reum to be legal. The PSC itself formally concluded that Reum's operations were legal in a subsequent ruling, although that was ultimately reversed by a court, and there is a sound basis for finding that Reum's operations, eventually established to have been illegal, were done in good faith. The PSC concludes that illegal operations do not bear on the fitness of Reum in this instance.

Element 5 -- Competition (Class D Only)

84 Generally, in the context of the economic regulation of motor carriers (the type of regulation administered by the PSC), competition is not a factor to be considered in applications for authority. Regulation is designed to substitute for competition by ensuring that a regulated carrier performs adequate services at rates that are just and reasonable. However, Class D carriers are unique as a class of regulated carrier, as neither their quality of service (except for fitness under Section 69-12-415, MCA) nor their rate is regulated (Class A and B rates are regulated, Class C rates are subject to regulation). Because regulation does not substitute for competition in Class D, the law

(Sec. 69-12-323(2)(b), MCA) permits that competition may be considered by the PSC in matters pertaining to Class D authority.

85 In considering competition, the PSC has not viewed competition as a controlling element, although it may have discretion to do so. The PSC has viewed competition in a fashion generally preserving as much of the basic principals of economic regulation in the motor carrier context as is possible. Competition has been viewed as one element among the others, although consideration of it does necessarily affect the analysis of at least two of the standard elements ("ability" and "harm") as discussed in the paragraphs following.

86 Under the PSC's historical evaluation of the role of competition, there must still be a proven need for the proposed services (competition does not affect this). Also, the applicant must still establish that it is fit to provided the services proposed (competition does not affect this). However, consideration of competition does significantly affect the analysis of the existing carriers' abilities to meet the need and resulting harm to existing carriers. Essentially, if a public need has been demonstrated and the applicant for authority has established that it is fit to provide the service, competition will permit a grant of authority even though an existing carrier might be able

to fill the need established or would be harmed by the grant of additional authority, if the overall outcome of such grant is not contrary to the public interest in the motor carrier context.

87 Therefore, generally, competition will be considered when doing so will further the public interest as that interest exists, particularly in context of motor carrier public convenience and necessity. A general discussion of this is included in Matter of Rozel, PSC Docket No. T-8205, Order No. 5319, paras. 26-34 and 49-52 (March 13, 1985).

88 Some of the recognized reasons justifying a consideration of competition and a grant on the basis of competition may include the existence of a need unmet by existing carriers, a substandard quality of service by existing carriers, or unreasonable rates by existing carriers. Rozel, Id., para. 50. Additionally, if there is a showing of better service at reasonable rates, the PSC may consider competition. Matter of Sanitation, Inc., PSC Docket T-93.54.PCN, Order No. 6251, para. 49 (November 3, 1993); and, also (same docket, on reconsideration), Order No. 6251a, para. 49 (December 23, 1993). Where there was little likelihood that competition would be destructive, a strong possibility that competition would have a positive effect, and an indication that competition would ensure reasonable rates and

encourage more aggressive solicitation of customers, the PSC granted authority. Matter of Averill, Docket No. T-8643, Order No. 5651, para. 37 (December 18, 1985). Furthermore, PSC policy on consideration of competition is still developing as new circumstances and issues present themselves. The PSC has previously determined that the question of whether competition is needed and beneficial to the public interest must be determined on a case by case basis. Averill, Id., para. 37.

89 In the present case the PSC finds that competition should be considered. Reum has demonstrated a public need. Reum has demonstrated fitness. Therefore, Reum has met the threshold which allows a consideration of competition. Because there was an unmet need (and possibly related concerns about quality of service, better service, and lower rates), a weighing of competition against the element of existing carriers' abilities to meet the need and the element of harm to existing carriers is in the public interest.

90 In the instant case it is difficult to question the benefits of competition when the facts demonstrate that benefits have resulted. Although the case is unusual in that Reum has been engaged in the transportation business (without motor carrier authority) for a number of years, it must be admitted

that the facts supply sound information that competition has permitted a meeting of two important unmet public needs. One is the stockpiling of used tires in 1988 and 1989, before Reum commenced operations. The other is the shippers' preferences for recycling, or at least a move toward recycling. (To prevent confusion, it is important to recall the distinction between a preference for one carrier over another and a preference for recycling as opposed to disposal.)

91 There was an unmet need in 1988 and 1989. Several stockpiles of used tires existed and illegal dumping of tires was occurring. Whether this was because of existing carrier rate structure, lack of disposal sites, existing carrier indifference, something else, or a combination of all of these, the problem existed. Reum solved it. Reum not only reduced or eliminated the stockpiles of used tires, his actions have resulted in the existing carriers now more aggressively pursuing the business of transporting used tires.

92 Additionally, no protestant presently recycles used tires. To the protestants, used tires are garbage. To the protestants, recycling of used tires is not economically feasible. To Reum this is not the case. Reum is actively moving in the direction of recycling used tires, something that the other

carriers simply are not now doing. Whether Reum's efforts will be successful is not known, but the point remains: shippers have a preference for recycling or at least a move toward recycling. Reum is meeting that need and the existing carriers are not.

93 In this regard, at least one protestant, BFI, submits that Reum's activities are hindering recycling efforts by reducing the supply of used tires and diminishing the economic feasibility of recycling of used tires. This argument might make sense if BFI were recycling used tires or presently doing something tangible in that direction, but it makes no sense when BFI is simply landfilling used tires in combination with other waste.

94 The PSC concludes that competition is in the public interest in this instance. Reum's presence as a carrier in competition with the existing carriers is in the public interest. The element of competition justifies a grant. The PSC also comments that competition works both ways. Reum has no absolute hold on this market. The existing carriers have already demonstrated that they are fully able to compete with Reum; as soon as the existing carriers began soliciting business, Reum lost customers. The PSC also concludes that there is no material fact demonstrating that competition will have an adverse effect on customer service.

ORDER

1 All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this order are incorporated herein as an order.

2 All pending objections, motions, and arguments not specifically having been ruled on in this Order (if any) shall be deemed denied, to the extent that such denial is consistent with this Order.

3 The Montana Public Service Commission, being fully apprised of all premises, HEREBY ORDERS that the Application for Intrastate Certificate of Public Convenience and Necessity filed by Vern and Shane E. Reum, dba Tires-R-Us, be GRANTED as follows:

CLASS D used tires and wheels between all points and places in Flathead, Lake, and Missoula Counties, Montana, to points in Lake County, Montana.

The granted authority will be effective on Reum's compliance with pre-operational statutes and rules administered by the PSC.

Done and dated this 22nd day of August, 1994, by a vote of
3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Vice Chairman

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to
reconsider this decision. A motion to reconsider must
be filed within ten (10) days. See 38.2.4806, ARM.